ATTORNEY FOR APPELLANT:

STAN G. WYRICK
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DANIEL LAMAR FISHER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0708-CR-683
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert Barnet, Judge
Cause No. 18C03-0602-FA-02

OCTOBER 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Daniel Lamar Fisher appeals his conviction and sentence for possession of cocaine, a Class A felony, Ind. Code § 35-48-4-6.

We affirm.

ISSUES

Fisher presents five issues for our review which we restate as:

I. Whether the trial court abused its discretion by admitting certain evidence.

II. Whether the trial court erred by allowing the State to amend the charging information immediately preceding the commencement of trial.

III. Whether Fisher's right to be free from double jeopardy was violated by his re-trial on the charge of possession of cocaine.

IV. Whether the evidence is sufficient to support Fisher's conviction of possession of cocaine, as a Class A felony.

V. Whether Fisher's sentence for his conviction of possession of cocaine is inappropriate.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the judgment follow. In February 2006, Officer Mueller of the Delaware County drug task force received a communication that Officer Stanley had seen Fisher in a vehicle nearby. Officer Mueller then saw Fisher as he drove by the place where Officer Mueller's vehicle was parked. Officer Mueller knew Fisher from prior dealings, and he knew that there was an active warrant for Fisher's arrest. He also checked the status of Fisher's license and learned that it was suspended. Because Officer Mueller was not in uniform and not in a marked police car, he radioed the Muncie city police and asked them to stop Fisher. Muncie police officer Krejsa attempted to stop

Fisher by turning on his red and blue police lights. Fisher responded by increasing his speed until he reached a dead-end street. Officer Krejsa ordered Fisher to exit the car, and he complied and was handcuffed. Officer Mueller then searched the vehicle Fisher was driving and found a substance later identified as cocaine on the driver's seat, driver's floorboard, driver's side door panel, and passenger seat.

Based upon this incident, Fisher was charged with Count I possession of cocaine, a Class A felony; Count II resisting law enforcement, a Class D felony; Count III maintaining a common nuisance, a Class D felony; and Count IV possession of marijuana, a Class A misdemeanor. Following a jury trial, Fisher was found guilty of Count II and not guilty of Count IV. The jury was deadlocked as to Counts I and III. The trial court declared a mistrial as to Counts I and III, and the State subsequently retried Fisher on those counts. On retrial, the jury found Fisher guilty of Count I and not guilty of Count III. In this appeal, Fisher addresses only his conviction and sentence for Count I possession of cocaine.

DISCUSSION AND DECISION

I. ADMISSION OF EVIDENCE

Initially, we note that Fisher frames this issue as whether his motion to suppress should have been granted. However, Fisher did not seek an interlocutory appeal after the denial of his motion to suppress. Rather, he proceeded with his trial and objected to the admission of the evidence at trial. Therefore, the issue is more appropriately framed as whether the trial court abused its discretion by admitting evidence obtained as a result of the allegedly improper traffic stop. *See Meredith v. State*, 878 N.E.2d 453, 454-55 (Ind.

Ct. App. 2007) (although defendant claimed on appeal that trial court erred when it denied his motion to suppress, issue was appropriately framed as whether trial court abused its discretion by admitting evidence at trial where defendant appealed following completed trial).

The admissibility of evidence is within the sound discretion of the trial court, and we will not disturb the decision of the trial court absent a showing of abuse of that discretion. *Gibson v. State*, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Fisher questions the propriety of the stop of his vehicle, which ultimately led to the discovery of the cocaine that was introduced as evidence at trial. An investigatory stop of a citizen by a police officer does not violate the citizen's Fourth Amendment rights under the federal constitution where the officer has a reasonable articulable suspicion of criminal activity. *State v. Ritter*, 801 N.E.2d 689, 691 (Ind. Ct. App. 2004), *trans. denied*. Whether reasonable suspicion exists is determined on a case-by-case basis by examining the totality of the circumstances. *Bogetti v. State*, 723 N.E.2d 876, 878 (Ind. Ct. App. 2000).[1]

---

[1] In his appellate brief, Fisher never mentions the federal Fourth Amendment or Article I, Section 11 of the Indiana Constitution. Further, he does not set forth the standard of review employed when alleging a violation of either constitutional provision. Fisher's failure to make any argument under Article I, Section 11 of the Indiana Constitution constitutes waiver of the issue on appeal. *See Gayden v. State*, 863 N.E.2d 1193, 1199 n.2 (Ind. Ct. App. 2007), *trans. denied*, 869 N.E.2d 461 (failure to cite any authority or make separate argument specific to state constitutional provision waives argument on appeal); *see also* Ind. Appellate Rule 48(A)(8). Therefore, we will address Fisher's contentions only under the Fourth Amendment reasonable suspicion standard.

In the present case, the stop was permissible. Officer Mueller testified that he knew Fisher and saw him drive past on the evening in question. At that time, Mueller knew that there was an active warrant for Fisher's arrest, and he determined that Fisher's license was suspended, as well. The officers had reasonable suspicion to stop Fisher. *See Bogetti*, 723 N.E.2d at 878 (reasonable suspicion entails minimum level of objective justification for stop – something more than inchoate and unparticularized hunch but less than proof by preponderance of evidence). Thus, the evidence obtained following the stop of Fisher's vehicle was properly admitted at trial.[2]

II. AMENDMENT TO CHARGING INFORMATION

As his second contention of error, Fisher asserts that the trial court erred when it allowed the State to amend the charging information preceding the commencement of his re-trial. We review the trial court's decision to allow the State to amend the charging information for an abuse of discretion. *See Ramon v. State*, 888 N.E.2d 244, 253 (Ind. Ct. App. 2008). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Brown v. State*, 830 N.E.2d 956, 963 (Ind. Ct. App. 2005).

The relevant procedural details commence with the State's filing of its original charge against Fisher on February 7, 2006. Fisher was charged with Count I possession of cocaine as follows:

---

[2] To the extent that it appears from Fisher's appellate brief that he is appealing the propriety of the search of the vehicle as a separate violation of his constitutional rights, we must decline to address that issue. Fisher's motion to suppress and argument at the hearing thereon dealt only with the propriety of the stop. Therefore, we address only that issue on appeal. *See Espinoza v. State*, 859 N.E.2d 375, 384 (Ind. Ct. App. 2006) (holding that any ground not raised in trial court is not available on appeal).

> The undersigned says that on or about February 2, 2006 in Delaware County, State of Indiana, Daniel Lamar Fisher did possess cocaine in the aggregate weight of at least 3 grams, said possession occurring within one thousand (1000) feet of a family housing complex, to-wit: Millennium place apartments, contrary to the form of the statutes in such cases made and provided by I.C. 35-48-4-6(a) and I.C. 35-48-4-6(b)(3) and against the peace and dignity of the State of Indiana.

Appellant's Appendix at 23. The first trial on this charge was held on June 25, 2007. Following a deadlocked jury as to the charge of possession of cocaine, the trial court declared a mistrial as to that charge. Fisher was re-tried on the charge of possession of cocaine on July 11, 2007. On July 10, 2007, the day before trial, Fisher filed a motion to dismiss the charge of possession of cocaine arguing that the information was defective because it lacked the mens rea of knowingly or intentionally. On the morning of trial, the State filed a motion to amend the charging information to include the mens rea. The trial court denied Fisher's motion to dismiss and granted the State's motion to amend the charging information.

Ind. Code § 35-34-1-5 governs the amendment of an information. The version of the statute that was in effect at the time Fisher committed the offense, provided as follows:

> (a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:
>
> ****
>
> (9) any other defect which does not prejudice the substantial rights of the defendant.

(b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:

(1) thirty (30) days if the defendant is charged with a felony; or
(2) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date.

(c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

The General Assembly amended Ind. Code § 35-34-1-5 effective May 8, 2007. That amendment eliminates references to matters of form in subsection (b), presumably in response to an inconsistency noted by our Supreme Court in *Fajardo v. State*, 859 N.E.2d 1201, 1205 (Ind. 2007). The revised Ind. Code § 35-34-1-5(b) states that the State can amend an information as to matters of substance at any time before the commencement of trial so long as the amendment does not prejudice the defendant's substantial rights.

The question of which version of Ind. Code § 35-34-1-5 to apply to cases currently on appeal was addressed recently by a panel of this Court in *Ramon v. State*, 888 N.E.2d 244 (Ind. Ct. App. 2008). It was decided that application of the revised statute in that case did not violate the ex post facto provisions of either the Indiana or United States Constitutions because the amendment was procedural. *Id*. at 252. The Court explained that an amendment is procedural for purposes of the ex post facto doctrine, and therefore may be applied to crimes committed before the effective date of the amendment, if it neither changes the elements of the crime nor enlarges its punishment. *Id*. The revised

version of Ind. Code § 35-34-1-5 defines the procedures the State must follow to amend a charging information without creating any new crimes, changing the elements of any crime, or altering the sentencing statutes. *See id*. Therefore, the amendment of Ind. Code § 35-34-1-5 is a procedural amendment and may be applied in the present case without violating the ex post facto provisions of either the state or federal constitutions.

With the guidance provided by *Ramon*, we consider the amendment of the charging information in the instant case. We must first determine whether the amendment is one of substance or one of form. An amendment is one of form and not substance if a defense under the original information would be equally available after the amendment and the accused's evidence would apply equally to the information in either form. *Fajardo*, 859 N.E.2d at 1207 (*citing McIntyre v. State*, 717 N.E.2d 114, 125-26 (Ind. 1999), *reh'g denied*, and *Haak v. State*, 695 N.E.2d 944, 951 (Ind. 1998)). Further, an amendment is of substance only if it is essential to making a valid charge of the crime. *Id*.; *see also Fowler v. State*, 878 N.E.2d 889, 892 (Ind. Ct. App. 2008).

Here, the original charging information did not include a mens rea for the offense of possession of cocaine. The amended information included the mens rea of "knowingly or intentionally." Applying the rule for distinguishing between amendments of form and those of substance, we conclude that the amendment in the present case is one of substance. The defenses available to Fisher and his evidence disputing the charge would be the same under the amended charge as under the original charge. However, the mens rea, which was completely missing from the original charge, is essential to making a valid charge of the crime. Ind. Code § 35-48-4-6 defines the offense of possession of

cocaine generally as "[a] person who, without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice, *knowingly or intentionally* possesses cocaine (pure or adulterated) or a narcotic drug (pure or adulterated) classified in schedule I or II, commits possession of cocaine or a narcotic drug." (Emphasis supplied). *See* Ind. Code §§ 35-34-1-2(a)(4) (information to set forth elements of offense) and Ind. Code § 35-34-1-6(a)(1) (information defective when not substantially conforming to I.C. § 35-34-1-2(a)).

As we previously noted, the revised version of Ind. Code § 35-34-1-5(b) provides that the State can make an amendment to a matter of substance at any time before the commencement of trial so long as the amendment does not prejudice the defendant's substantial rights. A defendant's substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge. *Ramon*, 888 N.E.2d at 252. If an amendment to the charging information does not affect any defense or change the positions of either of the parties, it does not violate a defendant's substantial rights. *Id*. The question, ultimately, is whether the defendant had a reasonable opportunity to prepare for and defend against the charges. *Id*.

Fisher presents no argument that the amendment prejudiced his substantial rights. The charge contained in the amended information was the same charge filed against Fisher in the original information, with the addition of the enumerated mens rea. However, the original information had already put Fisher on notice of the elements of the offense with which he was charged, including the mens rea, by citing to the statute defining the offense. Ind. Code § 35-48-4-6(a) sets forth the mens rea of "knowingly or

intentionally" in defining the offense of possession of cocaine and was cited twice in the original information. *See* Appellant's Appendix at 23.

In addition, at Fisher's first trial on this charge, both the trial court's preliminary and final instructions defined the crime of possession of cocaine using the mens rea of "knowingly or intentionally." (Tr. at 134 and 313-14). Further, at Fisher's first trial the State noted in its closing argument that "[t]he law criminalizes the knowing possession of cocaine. Now let's look at the knowing possession." (Tr. at 295). Moreover, Fisher's own counsel argued knowing possession to the jury. While implying that Fisher was not aware that the cocaine was in the vehicle that he was driving, counsel stated, "[d]oes that mean that, that there is something that I didn't see that makes me guilty? No. Because there's no knowing element there." (Tr. at 306). Fisher has not demonstrated substantial prejudice from the amendment of the charge; thus, we conclude the trial court did not abuse its discretion when it allowed the State to amend Count 1.

III. DOUBLE JEOPARDY

Fisher next contends that his right against being subjected to double jeopardy was violated. Specifically, he asserts that because his first trial ended with a hung jury, his re-trial using an amended charging information constitutes double jeopardy.

We first note that being retried on a charge upon which a jury hung does not violate the Double Jeopardy Clause of the United States Constitution. *Haddix v. State*, 827 N.E.2d 1160, 1164 (Ind. Ct. App. 2005), *trans. denied* (*citing Richardson v. United States*, 468 U.S. 317, 324, 104 S.Ct. 3081, 3085, 82 L.Ed.2d 242 (1984)). This doctrine --- known as the doctrine of continuing jeopardy --- recognizes that the federal double

jeopardy clause does not bar reprosecution of a defendant when a trial court terminates the first trial by discharging a jury that is unable to agree on a verdict. *Buggs v. State*, 844 N.E.2d 195, 199 (Ind. Ct. App. 2006), *reh'g denied*, *trans. denied*, 855 N.E.2d 1013. Because a hung jury is neither the equivalent of an acquittal nor a termination of jeopardy, the doctrine of continuing jeopardy applies such that re-trial may occur without a violation of double jeopardy principles. *Id*. at 200.

In the instant case, the jury from Fisher's first trial was deadlocked as to Count 1, possession of cocaine. Therefore, Fisher's original jeopardy never terminated with respect to that charge but instead continued through to the end of the second trial. Consequently, the fact that the State amended the charging information as to Count 1 after the first trial is of no moment to the continuation or termination of jeopardy. Rather, the critical question is whether the amendment was properly permitted by the trial court. Having already determined that the trial court did not abuse its discretion when it allowed the State to amend the charging information prior to the second trial, we also determine that there was no double jeopardy violation.[3]

IV. SUFFICIENCY OF THE EVIDENCE

Fisher claims that the State failed to present sufficient evidence to support his conviction of Count 1, possession of cocaine. Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the

[3] As Fisher did not argue that the Indiana Double Jeopardy Clause requires a result different than that reached under federal double jeopardy jurisprudence on this issue, we do not conduct a separate review under the Indiana Double Jeopardy Clause. *See Griffin v. State*, 717 N.E.2d 73, 76 n.6 (Ind. 1999), *cert. denied* (declining to conduct separate review under Indiana Double Jeopardy Clause where defendant failed to assert result different from result under federal double jeopardy clause).

credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id*. Moreover, we are mindful that the trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986), *reh'g denied*.

In order to obtain a conviction for possession of cocaine in this case, the State must prove beyond a reasonable doubt that (1) Fisher (2) knowingly or intentionally (3) possessed (4) at least 3 grams (5) of cocaine (6) within 1,000 feet of a family housing complex. *See* Ind. Code § 35-48-4-6(a) and (b)(3). Fisher challenges the State's evidence as to his possession of the cocaine, the weight of the cocaine, and his presence within 1,000 feet of a family housing complex.

We will address each element in turn. Possession of an item may be either actual or constructive. *Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004). Actual possession occurs when a person has direct physical control over the item. *Causey v. State*, 808 N.E.2d 139, 143 (Ind. Ct. App. 2004). On the other hand, a person has constructive possession of an item when the person has (1) the intent to maintain dominion and control over the item and (2) the capability to maintain dominion and control over the item. *Id*. The element of intent is proven by demonstrating the person's knowledge of the presence of the item. *Grim v. State*, 797 N.E.2d 825, 831 (Ind. Ct. App. 2003). Such knowledge may be inferred from either exclusive dominion and control over

the premises containing the item, or from evidence of additional circumstances indicating such knowledge. *Id*. These additional circumstances have been found to include: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) proximity of the item to the defendant; (4) location of the item within the defendant's plain view; and (5) the mingling of the item with other items owned by the defendant. *Causey*, 808 N.E.2d at 143. The second element of constructive possession, the person's capability to exercise control over the item, must also be demonstrated. This component includes the ability to reduce the item to the person's personal possession or to otherwise direct its disposition or use. *Id*.

Both Officers Mueller and Krejsa testified that they saw only Fisher in the vehicle as it passed them and that, when they stopped him, Fisher was the only occupant of the vehicle. Both officers also stated that Fisher fled when Officer Krejsa attempted to stop him. Testifying on his own behalf, Fisher admitted that he fled. Additionally, both officers saw what was later identified as cocaine on the driver's seat, driver's floorboard, driver's door pocket, and passenger seat. This evidence shows attempted flight by Fisher, proximity of the cocaine to Fisher, and location of the cocaine within Fisher's plain view. Further, the evidence demonstrates Fisher's ability to reduce the cocaine to his personal possession. Therefore, although Fisher presented testimony that at some point he had a friend in the car, that other people have access to the vehicle, and that the vehicle's door locks are inoperable, it is the jury's exclusive province to weigh conflicting evidence. *See Collier v. State*, 846 N.E.2d 340, 344 (Ind. Ct. App. 2006), *trans. denied*, 860 N.E.2d 585. We will not disturb the jury's determination. There was sufficient evidence from

which the jury could determine that Fisher had constructive possession of the cocaine found in the vehicle.

Fisher also questions the sufficiency of the State's evidence with regard to the amount of cocaine found. In support of his argument, he points to the testimony of his girlfriend that powder baby formula had been spilled in the vehicle. Fisher surmises that baby formula was inadvertently collected at the same time that the cocaine was collected so that the mixture contained both cocaine and formula to achieve the aggregate weight of at least 3 grams. Although in the second trial no evidence was presented specifically about the collection of the cocaine from the vehicle, the jury heard the testimony of Fisher's girlfriend regarding the spilled formula. The State presented the testimony of Jerry Hetrick, forensic scientist of the Indiana State Police Laboratory, who weighed the cocaine with a net weight result of 3.49 grams. Hetrick also testified on cross exam that he did not test the entire amount of the substance collected but that one screening test he performed on a sample of the substance revealed there might be another substance present. (Tr. at 427-28). However, Hetrick stated that in a confirmatory test (as distinct from a screening test), the substance was positive for cocaine and no other substance showed up. (Tr. at 429). Having heard all of this evidence, the jury found Fisher guilty of possession of cocaine weighing at least 3 grams. Fisher is merely asking us to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. *See Newman*, 677 N.E.2d at 593.

Fisher's final sufficiency challenge is to his possession of cocaine within 1,000 feet of a family housing complex. In addition to the weight of the cocaine exceeding 3

grams, this factor triggers the enhancement of the offense of possession of cocaine to a Class A felony. *See* Ind. Code § 35-48-4-6(b)(3).

The jury heard testimony that Officer Mueller measured the distance as 257 feet from the middle of the intersection of Willard and Madison Streets, where he first saw Fisher, onto the property of Millennium Place Homes, a family housing complex. (Tr. at 395, 397 and 385). Although Fisher presented the testimony of an investigator for the office of the county public defender that the dead-end of Luick Avenue, where Fisher was finally apprehended, was not within 1,000 feet of Millennium Place Homes, this Court has found that it is the act of entering the zone, not the police action of stopping the defendant, that triggers the enhancement. *See Chandler v. State*, 816 N.E.2d 464, 466 (Ind. Ct. App. 2004). In explaining its rationale, the court has stated, "'[n]othing forces drug offenders to drive within the drug-free zone created by the legislature. To the contrary, they pass there at their own peril and in jeopardy of their own penal interests.'" *Id*. (*quoting Polk v. State*, 683 N.E.2d 567, 571-72 (Ind. 1997)). There was sufficient evidence to show that Fisher's cocaine possession occurred within 1,000 feet of a family housing project.

V. INAPPROPRIATE SENTENCE

As his final assertion of error, Fisher contends that his sentence is inappropriate. We have the authority to revise a sentence if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). A defendant bears the burden of persuading the appellate court that his or her sentence has met the

inappropriateness standard of review. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). As long as a defendant's sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id*. at 490. An abuse of discretion occurs if the sentencing court's decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable and actual deductions to be drawn therefrom. *Id*.

With regard to the nature of the offense, the advisory sentence is the starting point in our consideration of an appropriate sentence for the crime committed. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006). Fisher was convicted of possession of cocaine as a Class A felony. The advisory sentence for a Class A felony is thirty (30) years. Fisher received a sentence of twenty-five (25) years.

As to Fisher's character, we note that, although only twenty-six (26) years of age, he has an extensive criminal history consisting of a felony conviction of dealing in cocaine and five misdemeanor convictions. The present conviction is Fisher's third drug-related conviction. Fisher has previous violations of probation, and he was on probation at the time this offense occurred. Additionally, Fisher was out on bond for the current offense when he was charged with new offenses in Hendricks County allegedly occurring in November 2006.

Fisher has not carried his burden of persuading this Court that his sentence has met the inappropriateness standard of review. *See Anglemyer*, 868 N.E.2d at 494 (declaring that defendant must persuade appellate court that his sentence has met inappropriateness standard of review). Fisher has been given several chances at rehabilitation, and he has

failed at them all. In light of the nature of the offense and Fisher's character, the sentence is not inappropriate.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court properly admitted at trial the evidence obtained as a result of the search of Fisher's vehicle. Further, the trial court did not abuse its discretion when it allowed the State to amend Count I immediately preceding the commencement of trial, and Fisher's re-trial on Count I did not violate the principles of double jeopardy. In addition, there was sufficient evidence to support Fisher's conviction of possession of cocaine, and his sentence is not inappropriate.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.